



SUPREME COURT OF KENTUCKY  
NO. 15-SC-000173-D  
COURT OF APPEALS FILE NOS. 2013-CA-000891,  
2013-CA-000930, 2013-CA-001642  
JEFFERSON CIRCUIT COURT ACTION NO. 11-CI-503339

JUDE MARIE WEBER (f/k/a LAMBE)

APPELLANT

V. DISCRETIONARY REVIEW FROM COURT OF APPEALS  
FILE NOS. 2013-CA-000891, 2013-CA-000930, 2013-CA-001642

THOMAS FRANCIS LAMBE

APPELLEE

BRIEF FOR THE APPELLANT, JUDE MARIE WEBER

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CERTIFICATE OF SERVICE

It is hereby certified that on the 11<sup>th</sup> day of April 2016, a copy hereof was served by mail upon Eugene L. Mosley, M. Thomas Underwood, Mosley, Sauer, Townes & Watkins PLLC, One Riverfront Plaza, 401 W. Main St., Louisville, KY 40202, Counsel for Appellee, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Judge, Jefferson Circuit Court Family Division Nine (9), 700 W. Jefferson St., Louisville, KY 40202. It is further certified that ten (10) copies of this Brief were sent by FedEx Overnight on this the 11<sup>th</sup> day of April 2016, in accordance with CR 76.12(3)(a) to the Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601.

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## **INTRODUCTION**

This is a review of an appeal from an action for dissolution of marriage where the husband appealed a divorce judgment, alleging that the Chief Family Court Judge, Hon. Stephen George, Jefferson Family Court, Division Nine (9), erred in his calculation of maintenance and child support and wife cross-appealed. The issues on appeal are the duration and amount of maintenance, the calculation of the husband's income, the calculation of the wife's living expenses, and the wife's request for attorney's fees. It is also a review of husband's second appeal from the Jefferson Family Court's and Court Appeals' denial of his post-divorce motion to modify his maintenance and child support obligations.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellant states that oral argument will not aid this honorable Court's understanding of the case and is an unnecessary expense on the parties.



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## **STATEMENT OF THE CASE**

### *Procedural History*

The Appellant is Jude Marie Weber (formerly Lambe) (“Jude”), and the Appellee is Thomas Francis Lambe (“Tom”). The trial court presided over a two (2) day trial in this matter on November 15 and 16, 2012. [R. 453].<sup>1</sup> The Jefferson County Family Court, Division Nine (9), entered its Findings of Fact, Conclusions of Law, and Judgment on February 26, 2013 (“FFCL”), adjudicating all then-outstanding issues between the parties.<sup>2</sup> The parties filed timely post-judgment motions requesting additional findings of fact pursuant to CR 52.02 and to alter, amend, or vacate that judgment pursuant to CR 59.05. [R. 474-503; 504-521]. On April 30, 2013, the trial court entered its order on those motions, as well as Jude’s motions to divide an undisclosed marital asset Tom owned, to supplement the record to include the parties’ 2012 income tax filings, to compel Tom to comply with the judgment, and to divide a bonus received by Tom.<sup>3</sup> Just three (3) months later, on August 7, 2013, Tom filed a motion to modify child support and maintenance. [R. 805-809]. The trial court declined Tom’s request to hold a hearing on his motion and denied Tom’s motion in its August 21, 2013 Order.<sup>4</sup>

A notice of appeal of the FFCL and the April 30, 2013 Order was filed on May 17, 2013 by Tom, a cross-appeal was filed on May 22, 2013 by Jude, and a second notice of appeal, from the trial court’s August 21, 2013 Order denying Tom’s second request to modify maintenance, was filed on September 19, 2013 by Tom, resulting in three (3)

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<sup>1</sup> All record cites contained herein refer to the record certified in the first appeal of this matter on September 9, 2013, unless otherwise noted.

<sup>2</sup> The February 26, 2013 FFCL is attached hereto as Appendix 1. It is located in the record at [R. 453-473].

<sup>3</sup> The April 30, 2013 Order is attached hereto as Appendix 2. It is located in the record at [R. 669-673].

<sup>4</sup> The August 21, 2013 Order is attached hereto as Appendix 3. It is located in the record at [R. 840-841].



appellate case numbers. The Court of Appeals entered its Order and Opinion on November 14, 2014 in case Nos. 2013-CA-000891-MR, 2013-CA-000930-MR, and 2013-CA-001642-MR, ordering the trial court to recalculate maintenance from the first appeal and denying Tom's second request to modify maintenance.<sup>5</sup> Jude filed a Petition for Rehearing with the Court of Appeals, which was denied in the Order dated March 17, 2015.<sup>6</sup> Jude then filed a Motion for Discretionary Review with this Court, granted in this Court's February 10, 2016 Order.

In addition to the appeals currently pending before this Court, this case was also appealed to the Court of Appeals by Tom on January 15, 2015 regarding the issue of Tom's third request to modify maintenance. That appeal, Case No. 2015-CA-000086, is currently pending before the Court of Appeals. Jude filed a notice of appeal on July 24, 2015 on the trial court's modification of maintenance after Tom moved the trial court to modify maintenance for the fourth time, which is pending before the Court of Appeals in Case No. 2015-CA-001141. Finally, Tom filed a notice of appeal on August 26, 2015 from an order citing him with contempt of court for failure to pay maintenance and child support, which is pending in Court of Appeals Case No. 2015-CA-001305.

#### *Material Facts*

Tom and Jude were married on October 10, 1992 in Jefferson County, Kentucky. [R. 2]. They were married for more than nineteen (19) years prior to their separation in June 2011, when Tom left Jude and the children on Father's Day. *Id.* There were two (2) children born during the marriage, Margaret Lambe ("Margaret"), born in 1996, and Kevin Lambe ("Kevin"), born in 1999. *Id.* Jude was a stay-at-home mother throughout the

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<sup>5</sup> The November 14, 2014 Order and Opinion is attached hereto as Appendix 4.

<sup>6</sup> The March 17, 2015 Order Denying Petition for Rehearing is attached hereto as Appendix 5.



parties' marriage and did not work outside of the home for more than twenty (20) years. [Appx. 1 at p. 4]. Margaret suffers from juvenile diabetes and severe eating disorders, and these conditions have historically required Jude to devote considerable time to Margaret's care. [R. 270].

The Jefferson County Family Court entered its FFCL on February 26, 2013 after a trial was held on November 15 and 16, 2012. [Appx. 1]. The parties jointly employed Helen Cohen as an accountant and agreed-upon expert to analyze the parties' income and living expenses and to trace the parties' non-marital assets. *Id.* at p. 2.

#### Division of Property

In its judgment, the trial court restored the parties' respective non-marital assets and divided the parties' marital property. [Appx. 1]. The majority of the marital property was divided equally by agreement, including the parties' ownership unit in Hurstbourne Property Group, LLC, the joint bank accounts, the ARGI investment portfolio, the marital portion of the parties' GE stock, the marital portion of the GE SS&P, and the marital residence. *Id.* at p. 15-18. The trial court summarized and equalized the marital property that was not divided by agreement as follows:

#### **Equalization Chart**

<b><u>Mr. Lambe</u></b>		<b><u>Ms. [Weber]</u></b>	
2007 Toyota Highlander	\$13,750	2006 Honda Pilot	\$10,125
Vanguard Account	\$13,030.40	BNY Mellon Account	\$27,703.61
G.E. Stock Options	\$46,796		
<b>Balance</b>			\$ 37,828.61
<b>Difference</b>			\$ 37,747.79
<b>Equalization</b>			<b>\$18,873.90</b>

*Id.* at p. 19.

### Income and Earning Capability

At the time of trial, Tom had worked at General Electric (“GE”) for twenty-six (26) years and was employed at that time as an Operations Manager. [R. 371]. During the marriage, Tom was the sole source of the parties’ income. [R. 269]. Tom’s income has remained largely unchanged throughout the trial court’s proceedings.

Ms. Cohen testified that Tom’s year-to-date income as of November 11, 2012 was \$256,615.32. [Appx. 1 at p. 3]; Respondent’s Trial Exhibit (“RTE”) 8. From that amount, Ms. Cohen determined that Tom’s regular income for 2012 would be \$285,496.51. [R. 438]; RTE 38. The trial court also heard evidence that Tom has historically received a yearly bonus of approximately \$30,000 and a grant of stock options for every year since 2004. [R.505]; VR, 11/15/12, 2:31:00-2:31:55; November 6, 2012 Deposition of Thomas Lambe, p. 97, L. 15-23; p. 98, L. 13-16; p. 100, L. 1-5.<sup>7</sup> While Tom had not yet received a bonus or grant for 2012 at the time of trial, he admitted that he would likely receive such income soon after trial, as he had historically received a grant of stock options each year. [Appx. 6 at p. 90, L. 3-7]. The evidence also demonstrated that the number of options granted to Tom increased dramatically over the last several years prior to the trial, from 900 to 1250 options per year in 2008 and 2009 to 4,000 to 10,000 options per year in 2010 and 2011. [R.506]; RTE 25.

While Tom testified that he recently changed positions at GE, he agreed that the new position would not affect his income. [Appx. 6 at p. 88-89]. Tom further testified that he received an incentive compensation bonus averaging \$30,000 per year in each year he worked at GE since he had been eligible to receive such a bonus. *Id.* at p. 97. Tom admitted

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<sup>7</sup> The November 6, 2012 Deposition of Thomas Lambe is attached hereto as Appendix 6.

that he would receive this bonus for 2012. *Id.* at p. 90. Tom further explained that GE wanted him to interview for a general manager position, where he would have received a twenty percent (20%) raise in income, but that he declined to be interviewed for this position. *Id.* at p. 135-136.

Ms. Cohen determined that not all of Tom's income was taxable, and she prepared an analysis of his last three (3) years' income, inclusive of bonuses and grants of stock options he received. [R. 505]; RTE 38. Without including the value of various non-taxable and deferred pre-tax benefits received by Tom, such as an employer-paid iPhone and cellular service, life insurance, and part of his health insurance, Ms. Cohen concluded that his 2010 income was \$210,283, his 2011 income was \$229,832, and his 2012 income would be approximately \$285,497. [R. 506]. According to the parties' 2012 joint tax return, Tom's gross income for 2012 was \$283,092. [R. 623-659].

Jude's vocational expert, Linda Jones, testified that Jude had no "past relevant work history" as defined by the Social Security Administration. VR, 11/15/12, 11:17:53-11:17:59. Ms. Jones opined that, after nine (9) to twelve (12) months, Jude could work as a customer service representative, receptionist, secretary, or a general office clerk. *Id.* at 11:18:45-11:18:52; 11:21:13-11:21:35. Based on her research and various vocational statistics, Ms. Jones stated that Jude's overall earning potential for the mean/average earnings for these jobs was a range between \$21,659 and \$25,769 per annum with a range of \$17,783 to \$20,081 for the starting salary. *Id.* at 11:21:52-11:21:59; 11:22:35-11:22:43.

Though Tom's vocational expert, Robert Tiell, disagreed about Jude's earning potential, both experts agreed that Jude was presently unable to work because of her care for the medical needs of Margaret. November 6, 2012 Deposition of Robert Tiell, p. 70, L.



8-17<sup>8</sup>; VR, 11/15/12, 11:18:03-11:18:34. Margaret's therapist, Amanda Nichols, testified to the time commitments that Jude faced in caring for Margaret and assisting in Margaret's recovery. VR, 11/16/12, 11:10:05-11:10:19. Margaret's treatment at that time included two (2) to three (3) medical appointments per week with Ms. Nichols, weekly appointments with her pediatrician, appointments with a dietician, and additional therapy appointments. *Id.* at 11:09:13-11:09:47. Jude was also required to be present at all of Margaret's meals, except those meals which Margaret eats at school, although Ms. Nichols testified that she recommended that Jude or a school counselor be present to observe Margaret's school lunches as well. *Id.* at 10:59:10-11:00:01; 11:09:55-11:10:04. Observing Margaret's meals further required Jude to monitor Margaret for thirty (30) minutes after all meals to ensure she did not purge. *Id.* at 10:58:32-10:58:43; 11:00:01-11:00:18. Tom did not assist Jude with any of the above medical care of Margaret.

The trial court concluded that Jude is unable to work due to the medical demands of the parties' daughter, Margaret. [Appx. 1 at p. 19]. Both parties testified that Jude had not worked outside of the home for over sixteen (16) years prior to trial. *Id.* at p. 4. The trial court referenced the extensive yet unsuccessful attempts Jude had made to find employment. *Id.* Jude additionally testified, and produced thorough documentation, that she had actively sought employment with various employers but had not even received a request for an interview. [R. 343-344].

#### Living Expenses

Ms. Cohen calculated Jude's post-divorce living expenses at \$10,887, assuming a fifteen (15) year home mortgage and a ten percent (10%) down payment on her car. [Appx.

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<sup>8</sup> The November 6, 2012 Deposition of Robert Tiell is attached hereto as Appendix 7.

1 at p. 10]; RTE 9. Jude also submitted a second list of post-divorce living expenses at trial of \$9,932 assuming a thirty (30) year mortgage and a new car with credit for the value of Jude's current vehicle. *Id.* Ms. Cohen's comprehensive and exhaustive analysis was based upon the parties' actual expenses drawn from their bank and credit card accounts over a period of three years: 2009, 2010, and 2011. RTE 10. Tom claimed, in his responses to discovery, that his monthly living expenses totaled \$5,181.67. RTE 36.

#### The Trial Court's Conclusions

Based on the above facts, the trial court entered its February 26, 2013 FFCL. [Appx. 1]. In its FFCL, the trial court found that Tom's gross yearly income is \$225,072, or \$18,756 per month, and that he has monthly living expense of \$4,500. *Id.* at p. 20. The court found that Jude is unable to work and that her reasonable monthly living expense are \$5,800 (including 39%, or \$1,440, of the children's expenses). *Id.* The trial court determined that the children's monthly expenses totaled \$3,697. *Id.* at p. 14. Tom was ordered to pay \$2,150.09 per month in child support and maintenance of \$7,300 per month for nine (9) years. *Id.* at p. 14, 20. Tom was also ordered to pay Jude \$15,000 in attorney's fees, although Jude had requested an award of \$79,000 in attorney's fees. *Id.* at p. 20.

As is relevant, the April 30, 2013 Order states that Tom's base salary was \$194,376 per year, plus an incentive bonus of \$30,700, making his total gross annual income \$225,076, or \$18,756.33 per month. [Appx. 2 at p. 1]. After his maintenance payment, the court found that Tom will have \$11,456.33 in gross income to pay his child support and personal living expenses. *Id.* The court further found that Tom's significant contributions to his retirement and other voluntary deductions "are entirely discretionary and do not negate or reduce his obligation to provide for his family." *Id.* at p. 1-2. Finally, the April

30, 2013 Order states that *Jude's expenses include thirty percent (30%) of the children's expenses "consistent with KRS 403.211, which reflects the duty of each parent to provide for the children in proportion to their incomes."* *Id.* at p. 2 (emphasis added). This statement is the basis for the Court of Appeals' granting of a portion of Tom's appeal.

Tom filed a motion to modify maintenance and child support on August 7, 2013, less than six (6) months after the original February 26, 2013 FFCL was entered and just over three (3) months since the entry of the April 30, 2013 Order denying his motion to alter, amend, or vacate the FFCL. [R. 805-809]. Tom's motion "request[ed] a hearing in order to introduce evidence showing a material change in circumstances that is so substantial and continuing that it makes the terms of [the trial court's FFCL] unconscionable." *Id.* The affidavit attached to Tom's motion alleged his net income was \$11,106 monthly and claimed that amount as insufficient to meet his monthly obligations, but he made no explicit claim that his income had actually changed since the date of the FFCL. *Id.* In denying Tom's motion without holding a hearing in its August 21, 2013 Order, the trial court specifically found that Tom's "affidavit does not set forth any change in circumstances to warrant a hearing on the motion." [Appx. 3 at p. 2].

#### The Court of Appeals Opinion and Order

The November 14, 2014 Court of Appeals Opinion and Order represents the Court of Appeals' decision on the appeal and cross-appeal from the February 26, 2013 FFCL and April 30, 2013 Order, and the appeal from the August 21, 2013 Order. [Appx. 4]. The Court of Appeals held:

- 1) the family court did not err in finding that Jude was not awarded significant property to provide for her reasonable needs;



- 2) the family court did not err in finding that Jude is currently unable to support herself through appropriate employment or in refusing to impute income to Jude;
- 3) the family court erred in calculating Jude's living expenses by including the children's expenses;
- 4) Jude is not entitled to an award of permanent maintenance, but the trial court did not make sufficient findings to support its award of maintenance for a period of nine (9) years;
- 5) the family court properly considered Tom's net income in determining maintenance;
- 6) the family court did not abuse its discretion in establishing the children's living expenses or in computing child support;
- 7) the family court did not err in its division of the Vanguard mutual funds;
- 8) the family court did not err in valuing the GE stock options;
- 9) the trial court's award of attorney's fees was not an abuse of discretion;
- 10) the family court did not err in its calculation of Tom's income;
- 11) the trial court did not err in its allocation of the expenses relating to the marital residence;
- 12) the family court did not abuse its discretion in refusing to divide Tom's HSA or 2012 bonus;
- 13) the family court did not err in refusing to grant Jude sole custody of the children;  
and
- 14) the trial court did not err in denying Jude's Motion in Limine.

*Id.* The Opinion held, in relation to the appeal from the August 21, 2013 Order, that the family court did not abuse its discretion in denying Tom's motion to modify maintenance. *Id.* at p. 29.

The Court of Appeals remanded to the trial court with instructions that "in calculating the amount and duration of maintenance, *the family court is not to consider any amounts expended by the party seeking maintenance for the care and support of a dependent child.*" [Appx. 4 at p. 13 (emphasis added)]. The Court of Appeals also remanded to the trial court to "make additional findings pertaining to the duration of maintenance." *Id.* at p. 15.

## **ARGUMENT**

### **Standards of review.**

In reviewing questions of law on appeal, the proper standard of review is *de novo*. *Revenue Cabinet v. Comcast Cablevision of South*, 147 S.W.3d 743, 747 (Ky. App. 2003). Findings of fact, on the other hand, are reviewed for clear error. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004). "When reviewing a trial court's findings under the clear error standard, the appellate court must determine 'whether or not those findings are supported by substantial evidence.'" *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010) (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). Substantial evidence is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (quoting *Moore*, 110 S.W.3d at 354). However, it "does not mean the evidence must be absolutely compelling or lead inescapably to but one conclusion." *Id.* Finally, where a trial court exercises its discretion, the act is reviewed for abuse of that discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair,

or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

**I. The Court of Appeals, in regards to its ruling on the trial court’s calculation of maintenance, has misconstrued the issues presented on appeal as well as the applicable law.**

- a. *The Court of Appeals incorrectly found that the trial court abused its discretion in including expenses attributable to the children in its calculation of Jude’s reasonable living expenses.*

The Court of Appeals admitted that the issue of whether a court should include expenses related to dependent children in determining a spouse’s reasonable needs in relation to a maintenance award under KRS 403.200 is an issue of first impression in Kentucky. [Appx. 4 at p. 10]. Nonetheless, the Court of Appeals held, in its November 14, 2014 Opinion, that “because [Tom’s] child support payment represents approximately 61% of the children’s expenses, the family court’s inclusion of Jude’s proportional share of the children’s expenses to her own expenses in calculating the maintenance amount essentially requires [Tom] to pay 100% of Jude’s and the children’s expenses for nine years.” *Id.* at p. 9.

Tom’s argument that Jude should not be allocated her proportionate share of the children’s expenses for purposes of determining Jude’s reasonable monthly living expenses to calculate maintenance must fail because it would require a court to ignore a significant portion of a custodian’s reasonable monthly living expenses. The trial court’s method of apportioning the children’s expenses in its February 26, 2013 FFCL was not erroneous, and the lower court did not abuse its discretion in including Jude’s portion of the children’s expenses in its maintenance calculation. In other words, the trial court’s calculation of Jude’s living expenses was not arbitrary, unreasonable, or unfair.



As duly noted by the trial court, Kentucky's child support statutes reflect "the duty of each parent to provide for the children in proportion to their incomes." [Appx. 2 at p. 2]. To rule otherwise would unfairly penalize the caretakers of children in maintenance cases. The obligations assigned to respective parties under the child support statutes deserve equal consideration when subsequently contemplating the calculation of maintenance. KRS 403.200 specifically requires that a court consider "[t]he financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, *including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian.*" (emphasis added). This emphasized phrase directly refers to the custodian's obligation to provide for the needs of the children.

KRS 403.200 cannot be interpreted to require a court to consider money received by the custodian for child support, while at the same time ignoring that custodian's expenses incurred due to the very nature of being a custodian. A child support calculation that allocates children's expenses between the parents proportionately based upon income, whether performed under the guidelines or deviating therefrom, does not yield a single sum that must be paid from one (1) parent to the other. Instead, it yields two (2) obligations, and each parent is responsible for his or her proportionate share, although there is only the payment from the noncustodial parent as the parent with primary residence pays the child's expenses directly. It follows, then, that, to the extent that Jude is responsible for a portion of the children's expenses, the children's expenses must be considered in determining the amount of maintenance awarded to her.

If, in considering “[t]he ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance” a court must consider one party’s child support obligation, equity demands that it must also consider the children’s expenses incurred by the spouse receiving maintenance. KRS 403.200. Limiting a court’s ability to consider child-related expenses to only those expenses incurred by the party paying maintenance, and not the party seeking maintenance, in a determination under KRS 403.200 would inhibit the court’s ability to enter orders that actually provide for the reasonable expenses of the party receiving maintenance, including that party’s expenses incurred in raising and providing for his or her children. It is well-known that the guideline amount of child support in Kentucky does not cover all expenses incurred in raising a child. In fact, in most if not all cases, the cost of raising children greatly exceeds the amount of child support paid by the noncustodial parent.

“An award of maintenance lies within the discretion of the trial court and a reviewing court will uphold the award if the trial court did not abuse its discretion or base its decision on findings of fact that are clearly erroneous.” *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). It would frustrate the trial court’s ability to exercise its established authority on the matter of spousal support to limit its considerations of fact. The Court of Appeals admitted that it “perceive[s] some validity in Jude’s argument that her costs related to the children should necessarily fall within her reasonable expenses,” and that this argument is “all the more persuasive in circumstances herein where Jude’s primary income is her maintenance award.” [Appx. 4 at p. 13]. In discussing those circumstances, the Court of Appeals referenced that “[t]he family court noted that Jude began looking for work immediately after the parties separated, but was forced to suspend her search when

Margaret's health deteriorated." *Id.* at p. 9. In doing so, the Court of Appeals tacitly acknowledged that, under the facts present in this case, Jude's sole source of income is the monies she receives from Tom. The only way for Jude to meet her reasonable living expenses, both those directly attributable to her and those that also benefit the parties' children, is through the receipt of maintenance payments from Tom. To exclude the real and present expenses incurred by Jude is to leave Jude with a monthly income deficit, when she has no alternative source to make up for that shortfall.

It is also important to acknowledge the difficult task that would be placed before any trial court forced to determine how to separate the portion of any given expense incurred solely by the party receiving maintenance in comparison to those expenses incurred by the children as well, or by the family unit as a whole. For example, Jude provided the trial court with evidence of her monthly expenses for retaining the parties' marital residence, for the utilities expended in living in that residence, and for her monthly food budget. RTE 9; RTE 10. It would be very difficult, if not impossible, for any trial court to determine what portion of these shared expenses is attributable to Jude and what portion is attributable to the parties' children who reside with Jude.

There is no reasonable way for a trial court to articulate that a certain percentage of the monthly electric bill, for example, is attributable to the children's use and must, therefore, be excluded from the calculation of Jude's monthly living expenses for the purpose of computing maintenance. Even if the trial court were to take the considerable time and effort to hear evidence on such an issue, eliminating whatever portion the court deemed attributable solely to the children would still ignore the fact that Jude is responsible for paying the entire utility bill. Jude would bear this responsibility whether or not the



children were found accountable for the majority of that cost and whether or not the trial court saw fit to include the entirety of the expense in determining her maintenance payment.

The trial court was correct in ignoring such minutiae and in focusing on the practicality of Jude's living situation. In doing so, it made sure to focus on the net monies Jude actually needed to pay her and the children's living expenses, and was not bogged down by abstractions. The maintenance and child support awarded by the trial court was ordered in an amount so that no surplus was left remaining after the payment of Jude's and the children's living expenses. In fact, the trial court did not award Jude enough money to cover all of the children's and her living expenses. The trial court found, and the Court of Appeals did not disagree, that Jude was unable to work due to the time commitment required to address her daughter's medical needs, and thus that Jude had no other source of income other than the maintenance payments. [Appx. 1 at p. 19-20].

Jude's sole source of income, money received from Tom for maintenance and child support, is used to pay the living expenses for herself and for the children. Additionally, Jude was ordered to pay for a portion of Margaret's substantial medical expenses, which Jude has paid out of her assets as this was not a monthly expense. [Appx. 1 at p. 15]. If the maintenance and child support payments do not cover Jude's and the children's living expenses, Jude will have a shortfall each month. It should make no difference whether the monies Tom pays to Jude are allocated to Jude or to the children, so long as Jude receives an amount of monies net of taxes to meet her and the children's living expenses. Tom actually benefits from paying higher maintenance payments and lower child support payments because of the allowable tax deductions for his maintenance payments. Although

Jude has to pay taxes, she is in a much lower tax bracket than Tom, and this arrangement allows more monies overall for the family overall due to the tax savings.

- b. *There are fundamental differences in Missouri law and Kentucky law, and the Court of Appeals should not have relied on Missouri law in making maintenance determinations.*

The Court of Appeals adopted the reasoning of *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. App. W.D. 2002) in its November 14, 2014 Opinion. [Appx. 4 at p. 11-12]. The Court of Appeals also cited the decision in *Nichols v. Nichols*, 14 S.W.3d 630 (Mo. Ct. App. 2000). *Id.* However, Missouri law's standard for the calculation of child support differs significantly from that delineated by the Kentucky Child Support Guidelines. *See* V.A.M.S. 452.340.

In *Cohen*, the court considered the appellant's claim that it was error to include in a party's reasonable expenses for purposes of calculating maintenance, "child expenses that were also included in the court's calculation of child support." 73 S.W.3d at 50 (emphasis added). Unlike Missouri, where *Cohen* was decided, Kentucky courts normally do not take into consideration monthly expenses for the purposes of calculating child support. *See* V.A.M.S. 452.340. Kentucky courts also do not normally take into consideration the extraordinary child-rearing costs and children's living expenses in the calculation of child-support, whereas Missouri courts include these expenses. *Id.* Instead, Kentucky law heavily relies on the Kentucky Child Support Guidelines of KRS 403.212, which are primarily based on the gross monthly income of the parties. While KRS 403.211(3) does provide exceptions to the use of guideline awards, these factors are not the standard basis for the calculation of child support as they are in Missouri.

*Nichols* can also be differentiated from the case at hand. In that case, the court considered the issue of whether "monthly expenses for care and support of the

grandchildren are properly includable in determining maintenance.” *Nichols*, 14 S.W.3d at 637. The court noted that the husband paying maintenance was “*not legally responsible for the support of his grandchildren.*” *Id.* (emphasis added). Accordingly, the court did not include the grandchildren’s expenses as part of the husband’s “reasonable needs.” *Id.* In contrast, the expenses of Jude’s and Tom’s children, whom both parties are legally responsible for and required to financially support, should be included in the computation of Jude’s reasonable living expenses.

Applying the rule of *Cohen* and *Nichols* to a Kentucky case has a much different effect than applying that same rule in a Missouri case. In Missouri, the children’s expenses are explicitly covered by child support obligations; whereas in Kentucky, if the Missouri rule disallowing the consideration of children’s expenses in a custodial parent’s maintenance award is applied, the children’s expenses will not be covered by either a child support or maintenance award. Especially in cases like this one where it has been found that the custodial parent cannot work outside the home and her sole source of income is her maintenance award, such a rule in this state effectively eliminates that portion of the children’s expenses apportioned to the custodial parent. The end result is that Jude will be required to pay just as many expenses for the children from her limited finances, while Tom will only bear responsibility for a portion of the total expenses incurred by the children. This is not the policy intended to be served by KRS Chapter 403.

Again, disallowing the inclusion of the children’s monthly expenses for the purpose of computing maintenance will result in practical problems, potentially creating unnecessary litigation. Certain basic monthly expenses, such as mortgage/rent, utilities, and groceries, are “household expenses” that cannot be easily attributed to the custodial



parent or child[ren] only. The Court of Appeals provides no guidance as to how such a division would be fairly obtained. If the trial court makes a pro rata allocation of household expenses such as rent, and the court applies the Kentucky Child Support Guidelines as the court applies in the vast majority of cases, the award of maintenance will only cover the spouse's "portion" of living expenses. Determining which expenses or portions thereof should be allocated to which parent or child is not only a tedious task, but often times an impossible task to impose on family courts in this state. Moreover, such a process will lead to more inconsistent results in maintenance cases.

- c. *The Court of Appeals should have adopted the specific findings of fact made by the trial court relating to the duration of Jude's maintenance award and should have found that the trial court abused its discretion in denying Jude's request for open-ended maintenance.*

As with the amount of maintenance, the duration of the award likewise falls within the trial court's discretion. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). The trial court considered evidence concerning the period maintenance is required and included findings regarding Jude's ability to maintain employment or to provide for her reasonable needs in its FFCL. [Appx. 1]. Given the meager income that Jude can expect to earn upon reentering the workforce, and the uncertainty of when that could even occur, and especially in light of Tom's income and the parties' standard of living during the marriage, it is evident that the trial court did not abuse its discretion in awarding Jude maintenance for a period of nine (9) years. *Id.*

KRS 403.200(1) states that a court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:

- (a). lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

- (b). is unable to support herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

KRS 403.200(2) states maintenance orders shall be in amounts and for periods of time as the court deems just, and after considering all relevant factors including the financial resources of the party seeking maintenance, the duration of the marriage, and the standard of living during the marriage, among others.

The trial court specifically stated that it had considered a number of factors in making its determination on maintenance, including all of the statutory factors under KRS 403.200:

the length of the marriage and the standard of living established during the marriage; the age, financial resources and physical and emotional condition of the party seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his needs and the needs of the spouse seeking maintenance.

[Appx. 1 at p. 19]. While the trial court did not specifically readdress all of these issues under the heading of “Maintenance” in its FFCL, it did give great consideration to these factors throughout the FFCL. [Appx. 1]. The trial court addressed, at length, Tom’s income and work history, Jude’s financial needs and the likelihood of her returning to work in the near future, the age of the children and Jude’s need to care for the parties’ children; the parties’ standard of living, etc.. *Id.*

Tom and Jude were married for more than twenty (20) years. [Appx. 1 at p. 3]. During that time period, the parties and the children enjoyed a very high standard of living. The trial court also found that Jude had been out of the workforce for more than sixteen (16) years because of an agreement between the parties’ that she would not work outside of the home after the children were born. *Id.* at p. 4. Prior to that time, Jude had a brief

period of employment in the role of an administrative assistant or secretary. *Id.* Both parties' vocational experts "agree that Margaret's condition must be stabilized before [Jude] can return to work." *Id.* at p. 5. Even after Margaret's condition is stabilized, Jude will bear primary responsibility for addressing Margaret's extraordinary health care needs and will continue to be the primary caretaker for both of the parties' children. *Id.* at p. 13. All those conditions resulted in a decreased likelihood that Jude would be able to obtain a job, or obtain additional training for a job, in the near future.

In fact, the circumstances of this case justify a finding that the duration of maintenance should be open-ended, and Jude requests that this Court make her award of maintenance open-ended. Such an award would be subject to review by the trial court in the case of a change in circumstances. In *Gripshover v. Gripshover*, the Kentucky Supreme Court held that the parties' fourteen (14) year marriage may require an open-ended maintenance award. 246 S.W.3d 460 (Ky. 2008). This Court stated:

We have recognized, however, that the statutory goal of rehabilitation will not always be attainable: [I]n situations where the marriage was long term, the dependent spouse is near retirement age, the discrepancy in incomes is great, or the prospects for self-sufficiency appear dismal, our courts have declined to follow that policy [rehabilitation] and have instead awarded maintenance for a longer period or in greater amounts. We agree with the Court of Appeals that this may be such a case.

*Id.* (citing *Powell*, 107 S.W.3d at 222). In the case at hand, given the length of the marriage (20 years), the uncertainty of her future employment, and the huge disparity in income, the trial court's failure to award Jude open-ended maintenance was an abuse of discretion.

The Court of Appeals found that, "the family court failed to make findings to justify its award of maintenance for a period of nine years," implying that the lower court did not find that Jude's need for maintenance will terminate in nine (9) years. [Appx. 4 at p. 15].



At the time the lower court entered its FFCL, Jude was forty-seven (47) years old; at the end of her maintenance award as it currently stands, Jude will be fifty-six (56) years old. [Appx. 1]. The likelihood of Jude's need for maintenance terminating before Jude reaches retirement age is low. The Court of Appeals is correct that the trial court erred in failing to make specific findings that Jude's need for maintenance would end in nine (9) years. It necessarily follows that the trial court failed to make specific findings that Jude's need for maintenance will ever terminate.

The Court of Appeals' implication that the trial court did not make specific findings to support the duration portion of the maintenance award is inaccurate. Obvious consideration was given to the issue of maintenance, as the trial court made findings concerning Tom's age, his work history, his high level position, and the fact that he had been earning a considerable salary with his employer for a number of years. [Appx. 1]. Similarly, specific findings were made regarding Jude's inability to support herself through the marital property apportioned to her, Jude's lack of work experience, and her inability to enter the workforce due to this lack of experience as well as her need to care for Margaret. *Id.* The trial court was provided with sufficient evidence and gave sufficient consideration to the relevant factors in finding that Jude was entitled to an award of maintenance for a duration of much longer than nine (9) years. The evidence presented supports a finding that Jude is entitled to an open-ended maintenance award. If there was a substantial change in circumstances such as a decrease in Tom's income or an increase in Jude's income, Tom could move to modify or decrease maintenance. Accordingly, the Court of Appeals erred in failing to find that the trial court abused its discretion in denying Jude's request for open-ended maintenance.

**II. The Court of Appeals has misconstrued the issues presented in Jude's Court of Appeals appeal as well as the applicable law.**

- a. *The Court of Appeals erred in affirming the trial court's calculation of Tom's income.*

Contrary to the Court of Appeals Opinion, Jude did not expect the trial court to rely solely on Tom's 2012 tax return in determining his income for the purpose of calculating maintenance and child support. [Appx. 4 at p. 23]. The definition of income for the determination of the child support, under KRS 403.212, is the party's "actual gross income" and "gross income" includes *income from any source . . .*" KRS 403.212(b) (emphasis added).

In order to prove Tom's actual gross income from all sources, extensive testimony was provided to the trial court by Ms. Cohen, the parties' joint forensic Certified Public Accountant ("CPA"). *See* RTE 38. Ms. Cohen projected that Tom's income for the year 2012 would be \$285,496.51 (exclusive of certain pre-tax benefits). *Id.* This figure reflects the fact that Tom has historically received a bonus of approximately \$30,000 and a grant of stock options *for every year since 2004*. *Id.* The trial court allowed supplementation of the record with the parties' 2012 tax return, which was not available at the time of trial, but showed that Tom's 2012 gross income was very close to Ms. Cohen's projections, \$283,092. [R. 623-659]; [Appx. 2 at p. 1].

Ms. Cohen also prepared an analysis of Tom's last three (3) years of income, inclusive of the bonus and stock options. RTE 38. Ms. Cohen concluded that Tom's 2010 income was \$210,283, his 2011 income was \$229,832. Ms. Cohen gave extensive testimony regarding Tom's gross income at the trial in this matter. VR, 11/15/12 at 1:09:30, et seq. Ms. Cohen testified that Tom had already earned \$256,615.32 at the time

of trial, and she reiterated her calculation that Tom's projected income for 2012 would be \$285,496.51. *Id.*

Further, the Court of Appeals' citation to *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000) is misplaced. [Appx. 4 at p. 23]. The issue before the trial court was the initial establishment of child support, not the modification of an existing child support obligation. However, the quotation from *Snow* was taken in the context of a modification of child support, not in the determination of child support and maintenance. *Id.* The end of that statement quoted by the Court of Appeals reads: "likewise may assist the court in determining whether an increase in income is 'continuing.'" *Id.* This citation was taken out of context, and its application to calculation of Tom's income in the present matter is misguided.

While the Court of Appeals scolds Jude for asserting that the trial court failed to account for the for the "likelihood of Thomas receiving future bonuses," Jude's actual assertion was that the trial court failed to account for both Tom's future bonuses and the stock options he received each year. [Appx. 4 at p. 23]. The trial court considered the calculation of Tom's income to be "artificially inflated because it includes significant taxable income from his exercise of stock options." [Appx. 1 at p. 3]. However, this statement discounts the likelihood that Tom will continue to receive additional bonuses and stock options as a result of his employment with GE, which runs contrary to Tom's historical earnings.

Tom's bonus in 2012 was \$30,700, and his base salary was \$195,787.80, which totals \$226,487.80. *See* RTE 38. Ms. Cohen's analysis and Tom's testimony reflect that he has received a grant of stock options for every year since 2004. *Id.*; [Appx. 6 at p. 97].



Tom had not yet received a grant in 2012 as of the time of trial, although he admitted that it was likely he would soon receive a grant as he had historically received a grant of stock options each year. [Appx. 6 at p. 90]. Tom received 10,000 stock options in 2009 and 4,000 stock options in 2010 and 2011. *See* RTE 25. The median number for these three (3) years is 6,000 stock options. Ms. Cohen calculated the net value for the stock options after the option price for the three (3) years at \$74,492. *Id.* Averaging out said sum over the last three (3) years equals an additional income per year of \$24,830.67, which brings Tom's total income to \$251,318.47, before the inclusion of bonuses, which increases Tom's yearly gross income by more than \$30,000, as described above. *Id.*

Based on the above, the Court of Appeals' affirmation of the trial court's calculation of Tom's income was erroneous and must be reversed.

*b. The Court of Appeals did not directly rule on Jude's argument that the trial court erred in determining her monthly expenses.*

While the Court of Appeals remanded the issue of Jude's monthly expenses, based primarily on the inclusion of expenses that were potentially attributable to the children, it did not directly rule on Jude's argument that the trial court underestimated Jude's living expenses. [Appx. 4 at p. 13]. Likewise, the Court of Appeals did not directly rule on Jude's request to remand to the trial court to make additional findings of fact on the issue of Jude's living expenses, to amend its findings regarding Jude's monthly living expenses to make specific findings that are consistent with the evidence heard at trial, and to recalculate maintenance based upon Jude's higher living expenses. *Id.*

Ms. Cohen calculated Jude's post-divorce living expenses at \$10,887 at a fifteen (15) year mortgage and a ten percent (10%) down payment on the car. [Appx. 1 at p. 10]; RTE 9. Jude also submitted a second, reduced list of post-divorce living expenses at trial

of \$9,932 assuming a thirty (30) year mortgage and a new car with credit for the value of the current vehicle (which had 125,000 miles). *Id.* Ms. Cohen's comprehensive and exhaustive analysis was based upon the parties' actual expenses drawn from their bank and credit card accounts over a period of three (3) years: 2009, 2010, and 2011. RTE 10. While the trial court determined that Jude's expenses were "overstated," that finding did not specifically state which of the expenses the Court found objectionable other than the mortgage payment Ms. Cohen calculated. [Appx. 1 at p. 11].

The trial court apparently determined its maintenance award utilizing the low, \$576, mortgage payment on the marital residence as Jude's housing expense. [Appx. 1 at p. 11]; RTE 11. While that amount represented the parties' current mortgage payment at the time of trial, Jude was only granted possession of the marital residence until Kevin completes the eighth (8<sup>th</sup>) grade in June 2014. *Id.* at p. 16. After that point, the marital residence was to be sold and Jude would have to purchase a new home or find a suitable place to rent. Ms. Cohen's analysis of Jude's living expenses presumed that Jude would incur rent or a housing expenses based upon the purchase or rental of a house valued at approximately \$275,000 (approximately one-half the value of the marital residence). RTE 11; RTE 9. The trial court erred in assuming that Jude will put all of her monies that she receives from the sale of the marital residence in a house down payment, as Jude will need to save a large part of these monies for retirement and to set aside enough money to continue to pay her portion of Margaret's extremely high medical costs.

If one removes the expenses for the mortgage, taxes, home insurance, house maintenance, gas and electricity, water, a car payment, auto maintenance, charitable contributions, and private school tuition, Jude's expenses are reduced by \$5,413. RTE 9.

However, adding in expenses associated with the parties' approximately 4,000 square foot marital residence, including \$576 for the mortgage payment, \$406 for gas and electricity, \$508 in property taxes, \$250 for insurance, \$100 for water, and the first \$500 per month in repairs and upkeep, yields an additional \$2,339 in monthly expenses. *Id.* As Jude drove a seven (7) year old car with 125,000 miles at the time of trial, simply removing the car payment included in Jude's trial exhibit would increase the car maintenance by \$100 per month to \$180. *Id.*; RTE 12. Thus, Jude's living expenses are at the very least \$7,814 per month.

The trial court heard testimony from Ms. Cohen that Jude will need to receive \$9,000 per month in maintenance to yield an after-tax income of \$6,892 a month. *See* RTE 14. While Jude does not dispute the trial court's finding that a maintenance award of \$7,300 per month will leave approximately \$5,840 after taxes, that sum is considerably less than her actual monthly expenses while continuing to remain in the marital residence. This disparity, in that Jude's expenses greatly exceed her income, will increase when Jude has to purchase a home or rent a home with a higher monthly payment. Apart from the funds that she receives from Tom, Jude has no income. This leaves Jude completely reliant upon the amount paid in maintenance to meet her living expenses. As the amount of maintenance is not sufficient to allow Jude to meet her reasonable expenses, the trial court's findings regarding her expenses must be corrected and the amount of maintenance paid must be increased accordingly.



- c. *The Court of Appeals erred in finding that the trial court did not abuse its discretion in denying Jude's request for Tom to pay all of her attorney's fees.*

The trial court abused its discretion in failing to award Jude sufficient attorney's fees, providing Jude with less than twenty percent (20%) of the attorney's fees she incurred during litigation. KRS 403.220 provides, in part: "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees."

Kentucky law holds that attorney's fees will be awarded when it is supported by an imbalance in the financial resources of the respective parties. *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986). The purpose of an award of attorney's fees is to level the playing field and ensure "access to the courts." *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 521 (Ky. 2001). KRS 403.220 exists to prevent one party to the contested action from controlling the outcome solely because he is in a position of financial superiority and has a more lucrative position of employment. *Id.* Pursuant to KRS 403.220, no more than a finding of disparity in the financial resources of the parties is required to assess costs against the wealthier party. *Gentry*, 789 S.W.2d at 937.

With respect to a finding of financial imbalance, the opinion in *Atkisson v. Atkisson*, 298 S.W.3d 858 (Ky. App. 2009), is instructive. In that case, the Court of Appeals affirmed an award of attorney's fees to the wife over the husband's claim of error, who argued that the fee award was unwarranted based upon the amount of marital and non-marital property assigned to the wife. *Id.* at 864-865. It noted that, while the wife was awarded "a substantial amount of liquid marital property," the husband retained "a substantially higher earning

capacity” and he received significant property as well. *Id.* at 865. Additionally, it recognized that the award of fees was “only about half” of the entire fee amount claimed by the wife. *Id.* The court refused to find an abuse of discretion under those circumstances.

Under *Atkisson*, Tom’s argument completely ignores the factors that weigh significantly upon the disparity of financial resources of the parties. Like the husband in that case, Tom has a much higher earning capacity than Jude, whom the court found was unable to work. There is a significant disparity in the parties’ financial resources. As a result, Tom is clearly in a position of financial superiority. In order to “level the playing field,” the trial court should have awarded Jude a greater percentage of the attorney’s fees she incurred in this case.

The trial court’s finding that Jude was entitled to only \$15,000 in attorney’s fees, out of the over \$79,000 incurred, was an abuse of discretion, and the trial court must be reversed, with this case remanded with instructions that the trial court enter findings regarding the award of Jude’s full amount of attorney’s fees requested that are consistent with the record in this matter.

### **III. Conclusion**

In conclusion, Jude requests that this Court reverse the November 14, 2014 Opinion and Order of the Court of Appeals, in part, to hold that:

- 1) the family court did not err in including Jude’s proportionate share of the children’s expenses in her reasonable monthly living expenses for the purpose of computing maintenance;
- 2) Jude is entitled to an award of open-ended maintenance;

